January, 1967, in the case of sub-letting existing before that date, to make his choice to treat such sub-letting as a joint-tenancy. His right expired after the 31st of March, 1967.

In view of this construction, no necessity arises to make any of the declarations asked for by way of ancillary reliefs.

Order accordingly.

Solicitors: *S. A. Lingam; S. N. Leow.*

TAN BING HOCK v. ABU SAMAH

[O.C.J. (Gill J.) January 18, 1968]
[Raub — Civil Suit No. 5 of 1967]

Contract — Illegal contract — Damages for breach of — Assignment of non-transferable right in land — Parties in pari delicto.

The defendant held a licence to extract timber from a specified forest area. He entered into a contract with the plaintiff by which for a consideration of $2,000, the right to extract timber was assigned to the plaintiff. The contract was in contravention of rules 2 and 18 of the Forest Rules 1935 which provide that no licence issued thereunder shall be transferable. The plaintiff brought an action for breach of the contract. He did not dispute the fact that the contract on which the action was founded was illegal, but contended that he was entitled to recover damages on the ground that he was not aware of the illegality.

Held: the evidence showed that both parties were *in pari delicto*. The loss must lie where it fell. The plaintiff could not found an action on the illegal contract to recover damages from the defendant.

Cases referred to:—

(1) *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.

(2) *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* [1961] 1 All E.R. 417.

(3) *Sajam Singh* v. *Sardara Ali* [1960] M.L.J. 52, P.C.

(4) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143, P.C.

CIVIL SUIT.

D. A. Devadason for the plaintiff.

Kam Woon Wah for the defendant.

Cur. Adv. Vult.

Gill J.: This is an action for damages for an alleged breach of a contract in writing dated the 30th day of August, 1965 whereby the defendant as the holder of a licence to take forest produce from the forest area of about a thousand acres known as Block 19 in Chegar Perah in the State of Pahang agreed to allow the plaintiff to fell, transport and sell timber from the said area for a consideration of $2,000.

The licence to the defendant was issued by the State Forest Officer, Pahang, on 1st July, 1965 under rules 2 and 18 of the Forest Rules, 1935. Under the contract in question between the parties the defendant as the licence holder was to make all arrangements with the Government concerning the area covered by the licence and the plaintiff was to compensate him for all expenses incurred in that connection. The plaintiff was also to pay the deposit of $2,000 and all other dues required to be paid to the Government under the terms of the licence and by virtue of any of the rules contained in the Forest Rules, 1935. In exchange for all the payments which the plaintiff undertook to make on behalf of the defendant as licence holder he was to have the full right to extract and sell for his benefit timber from the forest area in question. For the purported transfer of all the rights under the licence the plaintiff was to pay the defendant a sum of $2,000. It is thus clear that to all intents and purposes the agreement between the parties was a complete assignment of the rights in the licence to the plaintiff.

The licence issued to the defendant which is in evidence as Exhibit D.14 was clearly marked "Not transferable". The additional conditions annexed to the licence were that there was to be no transfer of it to another person by a power of attorney or by sub-letting or by other means and that no sub-contracts or partnerships may be made in connection with the licence without a prior approval in writing from the District Forest Officer. Rules 2 and 18 of the Forest Rules, 1935 provide that no licence issued thereunder shall be transferable. It seems clear therefore to me that the contract on which this action is founded was illegal. In this connection *Pollock and Mulla* on the Indian Contract Act (7th edition), page 145 in the commentary on section 23 of the Act, on which section 24 of our Contracts Ordinance, 1950 is based, says:—

> "Where a specific kind of land or specific rights in land have been declared by the legislature to be not transferable, a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of the section."

That passage was cited with approval by Thomson J. (as he then was) in *Hee Cheng* v. *Krishnan.*[1]

Counsel for the plaintiff did not seek to argue that the contract between the parties was not illegal. In fact he conceded that if the plaintiff knew at the time of the agreement that it was an illegal contract, then his claim must fail. He however, argued that the point at issue was whether the plaintiff knew that the contract was illegal. In this connection it was contended on the basis of the evidence given by the plaintiff that he was not aware of the illegality. His story is that before the agreement was signed he did not discuss the terms of the agreement with the defendant. He was asked to sign the agreement and he signed it. The agreement was in the Malay language and he did not get anybody to explain the agreement to him. He only knew a few terms of the agreement which the defendant explained to him and he only came to know

all the terms of the agreement when the case came up before the court for an order of injunction in May 1967*. In answer to questions put to him by the court, however, he admitted that he knew at the time of the agreement that the defendant had a licence from the Forest Department to extract timber and that under the agreement the defendant was transferring to him his right to extract the timber. He said that he did not know who prepared the agreement. It is clear, however, on the face of the agreement that it was prepared by a petition writer in Gemas. It was he who lived in Gemas at the time and not the defendant. I must therefore reject the whole of his evidence as regards his being unaware of the terms of the agreement. To my mind he knew full well what the agreement was about and he signed it with his eyes open. I also cannot accept his evidence that he did not see the licence. Thus there is no question of the parties being not *in pari delicto*. He also cannot be heard to say that he was ignorant of the law (see *Archbolds (Freightage) Ltd.* v. *Spanglett, Ltd.*[2]).

In the case of *Sajan Singh* v. *Sardara Ali* [3] it was held by the Privy Council that although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out, and on that account it was effective to pass the property in the lorry to the plaintiff. Accordingly the plaintiff was held entitled to succeed in detinue. The plaintiff was also held entitled to have a clear claim in trespass as on the facts he was entitled to rely on his possession. In the present case the only property which can be said to have passed to the plaintiff under the illegal contract is the timber which he extracted from the forest. The defendant can no more recover the value of this timber than the plaintiff can recover damages from the defendant under the illegal contract. In other words, the loss must lie where it falls. The case of *Palaniappa Chettiar* v. *Arunasalam Chettiar* [4] does not help the plaintiff either. That was a case in which a father had transferred his land to his son for an illegal or fraudulent purpose and the court held that he was precluded from obtaining the aid of the court in order to get the land back on the ground that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.

For the reasons I have stated, the plaintiff's action is dismissed with costs.

Action dismissed.

Solicitors: *D. A. Devadason; Kam Woon Wah & Co.*

* See [1967] 2 M.L.J. 148.

KOLANDAISAMY v. ANNAMALAI & THE HARBOUR TRADE UNION (SELANGOR) PORT SWETTENHAM

[O.C.J. (Gill J.) January 18, 1968]
[K.L. — Civil Suit No. 1652 of 1966]

Trade Union — "Dispute" between member and union — Union rule providing reference to arbitration — Whether court has jurisdiction to hear and adjudicate — Trade Unions Ordinance, 1959, ss. 38(1), 44 & 45.

Arbitration — Dispute between member and union — Rules providing for reference to arbitration — Whether court has jurisdiction to hear and adjudicate.

The plaintiff, claiming that he had been and was still a member of the union, sought in this action a declaration that the election of the members of the executive council of the union held on September 25, 1966 was null and void and an injunction to restrain the said executive council and every member thereof from acting in such capacity. On a preliminary point taken by the defendants the question the court had to decide was whether it had jurisdiction to hear and adjudicate upon the matter.

Held: (1) the crux of the matter in this case was whether there had been a dispute between a member of the union and the union. From the pleadings, the parties in the present case were in dispute;

(2) as the rules of the union provided that any dispute between a member and the union should be decided by reference to arbitration, the only way in which such dispute could come before the High Court was by way of a case stated for its opinion on any question of law as provided under section 45 of the Trade Unions Ordinance. Therefore in this case the court had no jurisdiction to hear and adjudicate.

Cases referred to:—

(1) *Palliser* v. *Dale & Ors.* [1897] 1 Q.B. 257.

(2) *Andrews* v. *Mitchell* [1905] A.C. 78.

(3) *Heard* v. *Pickthorne* [1913] 3 K.B. 299.

(4) *Winter* v. *Wilkinson* [1915] 1 Ch. 317.

(5) *McEllistrim* v. *Ballymacelligott Co-operative Agricultural & Dairy Society* [1919] A.C. 548.

(6) *The Municipal Permanent Investment Building Society* v. *Kent* (1884), 9 App. Cas. 260.

(7) *Norwich Corporation* v. *Norwich Electric Tramways Co. Ltd.* [1906] 2 K.B. 119.

CIVIL SUIT.

N. A. Majoribanks (*D. P. Xavier* with him) for the plaintiff.

V. K. Palasuntharam for the defendants.

Cur. Adv. Vult.

Gill J.: The plaintiff in this case claims that he has been and is still a member of the Port Swettenham Harbour Trade Union. He has brought this action for a declaration that the election of the members of the executive council of the union held on 25th September, 1966 is null and void and for an injunction to restrain the said executive council and every member thereof from acting in such capacity.

On a preliminary point taken by the defendants the question which I have to decide is whether this court has jurisdiction to hear and adjudicate upon this suit.